

William Lord Bishop of Derry, Appellant,
The Society of the Governor and Assistants London for the New Plantation in Ulster, Respondents.

The Appeal is to Reverse an Order of the High-Court of Chancery made the 22th of June, 1697. and some subsequent Orders made thereupon.

The Case of the Respondents, with some Remarks on a Paper, Intituled, The Case of William Lord Bishop of Derry.

THAT for the better distinguishing and ascertaining the several Lands in the County of *Derry* belonging to the Crown, from the Lands belonging to the Church, pursuant to a Commission issued to that purpose; an Inquisition was taken at *Derry* in the beginning of King *James* the I. his Reign, which found the several Lands and Tenements belonging to the See of *Derry* by particular Names; but the Lands in the Appeal mentioned are not found to be the Estate of that See, tho' the then Bishop of *Derry* was one of the Commissioners, and present in taking the Inquisition, and was one of the Persons that Signed to the Return thereof; but on the contrary, the Lands in Question are by the said Inquisition found to be a part of the Lands belonging to the Abby of *Columkill* at *Derry*, and Vested in His Majesty, by the Act for Dissolution of Monasteries in this Kingdom.

That King *James* the I. intending to Establish a Protestant Plantation in the Province of *Ulster*, and to have some Places of Strength Built for their Security against the Northern Rebels; which being too Great for a private Subject to Engage in, His Majesty proposed to the City of *London* the building of the City of *Londonderry*, and *Coleraine*, which they undertook to do, and Entered into Articles accordingly for so doing.

One of the Articles so agreed upon was, that four thousand Acres of Land lying on the *Derry* side next adjacent to the City of *Derry*, should be laid out and granted to the Society.

Pursuant to the said Articles, King *James* the I. by Letters Patents made in the 11th year of his Reign soon after the Return of the said Inquisition, did Erect a new Corporation out of the twelve chief Companies of *London*, by the Name of the Governour and Assistants *London* of the New Plantation in *Ulster*, and by the said Letters Patents, the Hill on which the City of *Derry* is now Built, and 4000 Acres of Land next adjoyning to the Western part of the City (whereof the Lands in Question are a part) with several other Lands were Granted to the Society; and a Power given to them and their Successors, perpetually to manage the said Plantation for the Use of the City of *London*.

By Vertue of the said Grant and Letters Patents, the Society became Seized in Fee of the City and County of *Londonderry*, and particularly of the 4000 Acres of Land adjoyning to the City of *Derry* (whereof the Lands in Question are a part) lying next adjoyning to the City of *Derry* on the *Derry* side, and soon after set out, and Assigned the Lands in Question, being about 1500 acres, to the Mayor, Commonalty, and Citizens of *Derry*, at a small Rent, for support of the Magistracy of *Derry*, who accordingly Entered, and by themselves,

selves, and Under-Tenants quietly Enjoyed the same, under the Title of the Respondents, till the 13th Year of the Reign of King *Charles* the I. without any Interruption given them by the then Bishop of *Derry*, or any of his Predecessors.

The City of *London* at that time being in some Disfavour with King *Charles* the I. His Majesty in the beginning of *Novemb.* in the 13th Year of his Reign, Ordered a *Scire facias* to Issue against the Society of *London*, for a pretended Breach of Covenants in the Letters Patents and Rules of Plantations; and in *Hillary-Term* following, before the Society could be heard to make their Defence thereto, Judgment was Entred against them by Default; that the said Letters Patents should be Void and Cancelled, but no Seifure was ever made of their Lands or Liberties, but they still continued Seifed thereof as formerly.

K. Charles the I. being afterwards in the year 1641 made sensible of the hardships done to the Society, by the Proceedings and Judgment on the said *Scire facias*, was graciously pleased to declare his Royal Pleasure and Resolution to Restore and Confirm the Society in their former Grant; but was prevented in so doing by the Rebellion in 1641, which soon after broke out in this Kingdom.

But King *Charles* the II. upon his Restoration, by Letters-Patents, dated the 10th of *April* in the 14th year of his Reign, taking Notice therein of His Father's Intentions, did restore to the Society and City of *London* the said City and County of *Londonderry*, and all the Lands formerly granted them, and particularly by Name the 4000 Acres of Land next Adjacent to the City of *Derry*, of which the Lands in question are a part; whereupon the City and Corporation of *Derry*, who all along enjoyed their Liberties and Franchise, and continued in Possession of the Lands in Question, under the Title derived to them from the Society, as aforesaid, became Tenants to the Society, as formerly, and so continued till the year 1692, or thereabouts; during all which time the Society never heard of any Title or Claim made to the Lands in question by the Appellant, or any of his Predecessors.

About the year 1692. the Society were told that the Appellant Claimed the Lands in question as Lands belonging to the See of *Derry*; and upon Enquiry into the Matter, they were informed and found out, that in the 13th year of King *Charles* the I. when the City of *London* were under His Majesties Displeasure; and before any Process at Law issued upon the *Scire facias* aforesaid, by a Combination had and carried on between Dr. *Bramhall*, then Bishop of *Derry*, and the Corporation of *Derry*, to defeat the Society of their Possession and Title to the Lands in question: The said Bishop of *Derry*, by his Interest with the *K.* and the connivance of the City of *Derry*, prevailed with his Majesty *K. Ch. I.* by Letters-Patents, dated the 4th of *August*, in the 13th year of his Reign, to grant to the said Bishop and his Successors, the Lands and Tenements in question; Which Grant was made, as aforesaid, about six Months before Judgment was given against the Society on the said *Scire Facias*, when the Corporation of *Derry* was in the actual and peaceable possession thereof, by a Title derived to them under the Society, and when the King had no Title to, or Estate in, the Lands Granted.

That in the said Grant made by the said Letters-Patents to the said Bishop of *Derry*, there is a Reservation of the yearly Rent of 90*l.* 10*s.* 00*d.* made payable out of the Lands in question, to the Mayor, Commonalty, and Citizens of *Derry*, and their Successors, for ever; which argues the said Lands were not the Churches Lands, and Evidences the Combination aforesaid.

That in further pursuance of the Combination aforesaid, the Society were given to understand, that the said Bishop of *Derry* made a Lease to the Corporation of *Derry*, dated the 11th of *June* 1638. whereby the Lands in question were pretended to be Demised to the said Corporation of *Derry* for Sixty Years, to Commence from the Fourteenth of *July*, 1634. at the

the Yearly Rent of Fifty Pounds *per Annum*, by which pretended Lease it appears by recital therein, that the Corporation of *Derry* was in Possession of the Lands so Demised, which was the Possession Derived to them from the Society, as aforesaid, out of which they were never divested; all which notwithstanding the said Corporation of *Derry* owned the Society as their Landlords, during the continuance of the said Lease, yet paid the yearly Rent reserved thereupon to the Bishop, and his Successors, as the Society is informed.

By all which matters it plainly appears, that the Grant made by the said Letters-Patents to Dr. *Bramhall*, then Bishop of *Derry* was *ipso facto* Void, and his Lordship having no Title, and being out of Possession could make no Lease thereof, and by his perfecting a Lease to the Corporation of *Derry* he conveyed no possession to the said Corporation, and Consequently the possession which they then had was not in Judgment of Law a possession of the Bishop of *Derry*, but the possession of the Society of *London*, from whom they derived their Title thereunto.

That King *James* the First was seized, and made such a grant to the Society, as aforesaid, was proved by the Inquisition and Letters-Patents, produced on the hearing,

That the Society were Proprietors of the Lands in question, and paid the Quit-Rent, and do now pay the same, was proved by the Civil Survey, and the Auditor Generalls Receipt produced on the hearing, which also demonstrate the Lands were actually Set out; for without such setting out the Rent would not by the Course of the Exchequer be put in Charge.

That the City of *Derry* were in possession of the said Lands, and were reputed to hold the same under the City of *London* by the same Tenure that *Derry* was held, till three years before 1641, was proved by the Depositions of Witnesses read at the Hearing.

That the Appellant did not so much as pretend to Prove on the Hearing, that he or his Predecessors were ever seized of the Lands in Question, or in possession thereof, otherwise then by the Receipt of 50*l.* a Year from the Year 1662, till the Year 1694, which was reserved on the Lease made as aforesaid; altho' the Title is insisted on by the Bill, and denied in the Answer, so as the same was fairly in Issue, and the Appellant might have Examined Witnesses thereto, if any Title he had to the said Lands.

That the said Lease was void in Law, and only a Lease by Estoppel, that could not any ways influence the Lands or the possession thereof, but only affected and concluded the Parties thereunto, during the Term only, but the Bishop of *Derry* gained no possession thereby, nor by the payment of the Rent reserved thereupon; the same being only due and payable by Estoppel, as aforesaid, nor ought these proceedings between the See of *Derry* and the Corporation of *Derry* any ways to affect the Societies Title and possession of the said Lands, the same being managed privately and without any Notice given thereof to the Society.

As to the Orders of the House of Lords in the Appellants Case mentioned to have been conceived by their Lordships, after the Restoration of King *Charles* the II^d. They conceive themselves not affected thereby, as well because they were not Parties thereto, as because they relate not to the Lands in the Appellants Bill, but to the Lands of *Termonderry* in which they are not concerned, and seem Calculated to enforce the Corporation of *Derry* to perform their Agreement with the Bishop, but not to affect these Respondents Possession or Title.

But true it is that the Society upon the discovery of the Proceedings herein before set forth did order their General Agent Mr. *Cairnes* to continue secure, and keep their Possession of the said Lands against the Appellant, who did accordingly in 1694. peaceably enter on a vacant Possession, and the Society by themselves or under-Tenants, have ever since that time been, and are now, in the possession thereof.

That the Appellant in October 1694. Filed his Bill in the High Court of Chancery, to be restored to, and quieted in the possession of the said Lands; but the then Lord Chancellor *Porter* refused either to restore the Appellant to the possession, or to Sequester the Rents, or make any Decree therein till the Society was heard to the same, it appearing by the Answer of the other Defendants the Society were concerned in Interest, and this was a Case of that Import, that the late Lords Commissioners of the Great Seal, after three or four days spent in Hearing the Cause, and taking several days to deliberate thereon, gave no Judgment therein, Their Lordships Conceiving the Case to be of great difficulty, and not having agreed how to Rule or Adjudg the same.

On the 11th of *June* 1697, the Cause was heard; and the Court took time till the 22th of *June* following, to Consider the Matter; on which day the Lord Chancellor Declared that he conceived a Doubt whither the Appellant or any of his Predecessors were in any actual Possession of the Lands in the Bill, or in such Possession by the Receipt of Rents during the Lease, as by the construction of Law, would give him a right to the Possession after the Expiration of the Lease, and hereupon Ordered a Tryal to be had at Law on an Issue proper.

On the 30th of *June*, on Motion of the Appellant, the Lord Chancellor took into Consideration the Notes of the 22th of *June*, and finding that the Register had mistaken the Sence of the Court, the Notes were rectified and altered, as the Appellant in his Case sets forth, however it seems very unnecessary to Mention the Notes taken by the Register by mistake on the 22th of *June*, in the Printed Case; Since the same were not the Judgment of the Court, nor any way contain the Opinion of the Lord Chancellor, but ought to have been omitted by the Register, as they might have been in the Printed Paper or Case.

On the 18th of *July*, the Appellant, by his Petition, humbly prayed the Court, as in the Appellant's Case is Alledged, it being insisted upon by the Council, for the Society, that the Court could make no alteration of the Order formerly made in the Cause, without a re-hearing, his Lordship on debate of the Matter, Declared that he could make no Order on a bare Petition, in Contradiction of what he had already declared, which is the Constant and Established practice of all Courts of Equity, and to have done otherwise, would have been unwarrantable.

The Matter standing thus, the Appellant did appeal to the House of Lords, from the said Order of the 22th of *June*, and the subsequent Order made thereupon, and upon the hearing before the House of Lords, the Case appeared to be as herein above set forth.

As to the 3 Nota's and the other Matters, in the Appellants Case mentioned, they are altogether mis-represented, but being immaterial, and not pertinent to the Case, the Society do not think it proper to make any further answer thereunto: And upon the whole matter, they hope that the doubt conceived, and the issue designed to be tryed by the Lord Chancellor, will not be looked on as putting the Appellant to the Charge and Delay of a Tryal; what the Construction of Law should be on a Matter of Fact confessed as the Appellant in his Case sets forth; The Fact on the behalf of the Appellant, being so far from being made clear, that there was not the least proof of any one Matter of Fact in the Appellant's Bill alledged, as against the Society, inasmuch as the Answer of one Defendant is not allowed as Evidence against any other Defendant; and it would be more irregular to admit it in this, then other cases, since the Answer of the Corporation of *Derry*, on which the Appellant relied most, is not on Oath: But it being allowed on all hands, that the Corporation of *Derry* had been in possession of the Lands in Question; his Lordship desired to be informed by a Tryal at Law, how and by what means, and under what Title they came to, and enjoyed that possession; upon the finding of which Matter of Fact, his Lordship would be enabled to give his Judgment? whither the Appellant ought to be restored to and quieted in the possession according to the Prayer of his Bill, which issue might have been tryed the very next Term, and the Jurors would have then found the truth of the Fact, to wit, how and under what Title the Corporation of *Derry* came into, and continued the possession of the Lands in Question, which is a bare Matter of Fact, and not clear unless it be so against the Appellant, so as the Court is unnecessarily charged with putting Matters of Law under the enquiry of a Jury: And if on return of such Verdict, it had appeared to the Court that the Corporation of *Derry* had possessed the Lands in the Bill under the Appellant's Predecessor, and the Court had refused to quiet the Appellant, he would then have had just cause of Appeal, while they conceive he hath not yet had.